

DOCKET FILE COPY ORIGINAL

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

OCT 12 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Promotion of Competitive Networks in	)	
Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's Rules	)	
to Preempt Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas Designed To	)	
Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
to Preempt State and Local Imposition of	)	
Discriminatory And/Or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS OF TELIGENT, INC.  
IN RESPONSE TO THE COMMISSION'S NOTICE OF INQUIRY

Laurence E. Harris  
David S. Turetsky  
Terri B. Natoli

Philip L. Verveer  
Gunnar D. Halley

TELIGENT, INC.  
Suite 400  
8065 Leesburg Pike  
Vienna, VA 22182  
(703) 762-5100

WILLKIE FARR & GALLAGHER  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20036  
(202) 328-8000

Attorneys for  
TELIGENT, INC.

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**COMMENTS OF TELIGENT, INC.  
IN RESPONSE TO THE COMMISSION'S NOTICE OF INQUIRY**

Teligent, Inc. ("Teligent") hereby submits its comments in response to the Notice of Inquiry in the above-captioned proceeding.<sup>1</sup>

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<sup>1</sup> Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217

The Commission seeks comment on telecommunications service providers' right-of-way management experiences, including problems that providers have encountered, successful solutions, and information regarding the prevalence of these experiences.<sup>2</sup> Teligent has explained previously to the Commission how some local governments use their legitimate public right-of-way management authority in an unlawful manner as a means of generating revenue and regulating entry.<sup>3</sup> Since that time, Teligent has had to resort to costly and time consuming litigation against one city<sup>4</sup> and has faced the threat of similar potential litigations in other local jurisdictions, as well. Pursuant to their local right-of-way management authority, some local governments seek to assess right-of-way fees and impose right-of-way franchise requirements on carriers, such as fixed wireless carriers and resellers, that do not dig up the public streets or thoroughfares or otherwise use the public rights-of-way. Teligent does not dispute the legitimacy of local government authority over public rights-of-way nor the right of these local governments to impose reasonable fees and obligations related thereto. Teligent does, however, oppose the extension of this legitimate authority to regulate carriers or otherwise accomplish municipal goals

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and CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, FCC 99-141 (rel. July 7, 1999)("Notice").

<sup>2</sup> Notice at ¶ 79.

<sup>3</sup> See Commission Actions Critical to the Promotion of Efficient Local Exchange Competition, CCBPol 97-9, *Comments of Teligent* at 33-35 (filed Aug. 11, 1997).

<sup>4</sup> See AT&T Communications of the Southwest, Inc. v. City of Dallas, Texas, 52 F.Supp.2d 756 (N.D. Tex. 1998)("Dallas II")(Teligent opposing an attempt by the City of Dallas to impose upon it franchise obligations (and to withhold a 9-1-1 agreement until Teligent agreed to such franchise obligations) for use of the public rights-of-way when Teligent did not maintain any facilities in the public rights-of-way. A description of the events surrounding this case is provided as an Attachment to these comments in order to provide

that are not tied directly to the actual use of the public rights-of-way as explained in more detail below.<sup>5</sup>

Section 253(c) preserves State and local government authority to manage the public rights-of-way and to require fair and reasonable compensation on a competitively neutral and nondiscriminatory basis for the use of such rights-of-way.<sup>6</sup> The preservation of authority in Section 253(c) is subject to some critical limiting conditions. First, and most importantly, Section 253(c) does not grant local governments general authority to regulate all telecommunications carriers.<sup>7</sup> The authority preserved by Section 253(c) is limited to the local governments'

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the Commission a first hand factual account of just how onerous certain of these requirements can be.).

<sup>5</sup> See, e.g., Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland, 49 F.Supp.2d 805, 817 (D. Md. 1999)(*"Prince George's County"*)(Prince George's County sought to impose a franchise obligation on telecommunications carriers -- including resellers -- that included a requirement for telecommunications carriers to pay a percentage of their gross revenues -- including revenues from long distance services -- to the County in franchise fees. The franchise application required carriers to submit a vast amount of information and granted with the County the discretion to grant or deny a franchise based on, *inter alia*, a carrier's managerial, technical, financial, and legal qualifications. The court found that the County ordinance "regulates providers of telecommunications services in the most comprehensive and utterly discretionary fashion, and that this far exceeds the County's authority to manage the public rights-of-way under Section 253(c).").

<sup>6</sup> 47 U.S.C. § 253(c).

<sup>7</sup> See AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F.Supp.2d 582, 591 (N.D. Tex. 1998)(*"Dallas I"*) ("Federal law therefore limits the scope of Dallas's authority to regulate telecommunications to two narrow areas: the 'management' of city rights-of-way, and the requirement of fees for use of rights-of-way. The language of § 253 is straightforward."); see also, Dallas II, 52 F.Supp.2d at 762 ("If Congress had intended the broad interpretation of § 253(c) that the City proposes it would have defined a municipality's authority as management of all providers of local telephone service, and the imposition of fees for the right to provide it. Through the FTA Congress expressly removed such broad regulatory power from local governments."). Teligent does not dispute that State governments, as opposed to local governments, retain and typically exercise the authority to regulate telecommunications carriers. Indeed, in some instances,

management of public rights-of-way. Moreover, the management must be accomplished in a competitively neutral and nondiscriminatory manner. For example, local governments must treat ILECs and new entrants in the same manner to the extent that they use the public rights-of-way in the same way, and should impose fees only for *actual* use of the public rights-of-way rather than "imputed" use, as some municipalities attempt. Use of the public rights-of-way must be permitted on a nondiscriminatory basis. Finally, any compensation required for use of the public rights-of-way must be fair, reasonable, and publicly disclosed.

Several federal courts have interpreted these provisions since the enactment of Section 253 in 1996 to set aside unlawful municipal attempts to regulate telecommunications carriers. For example, federal courts have held that neither fixed wireless carriers nor resellers "use" public rights-of-way and therefore are not subject to the municipal exercise of right-of-way management authority.<sup>8</sup> Courts have also determined that local governments may not impose requirements -- such as producing extensive financial information or providing free or discounted service to the municipality -- that exceed the scope of right-of-way management authority.<sup>9</sup> Indeed, these

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the overreaching of local governments interferes with the lawful exercise of State government authority over telecommunications. See also *Dallas I*, 8 F.Supp.2d at 591 ("Absent explicit delegation by the state legislature, cities do not have the more general authority to regulate to protect public safety and welfare, advance universal service and ensure quality -- this is a function reserved to states by § 253(b), not to local governments.").

<sup>8</sup> See, e.g., *Dallas II*, 52 F.Supp.2d at 761-62 (fixed wireless providers do not use the public rights-of-way); see also *AT&T Communications of the Southwest v. City of Austin, Texas*, 975 F.Supp. 928, 943 (W.D. Tex. 1997) ("*Austin*") and *Prince George's County*, 49 F.Supp.2d at 820 (resellers do not "use" the public rights-of-way).

<sup>9</sup> See, e.g., *Dallas I*, 8 F.Supp.2d at 593; see also *BellSouth Telecommunications, Inc. v. City of Coral Springs, Florida*, 42 F.Supp.2d 1304, 1309-1311 (S.D. Fla. 1999) ("*Coral Springs*").

courts recognize that the Telecommunications Act of 1996 substantially limits the lawful exercise of municipal authority over telecommunications carriers in an effort to promote the widespread development of telecommunications competition.<sup>10</sup>

Notwithstanding these decisions, some cities continue to enact regulations that would require fixed wireless carriers to obtain municipal approval before providing telecommunications service or that would otherwise impose onerous regulatory burdens on all carriers without regard to their use -- or lack thereof -- of the public rights-of-way. For example, the City of Boston recently began requiring telecommunications providers operating there to receive certification from the City. The certification requirement is not restricted to telecommunications carriers operating within the public rights-of-way. In fact, upon inquiry as to the application of this "certification" to Teligent, in spite of the fact that it does not construct facilities in the public rights-of-way, Teligent was informed that the information requirement was deliberately extended to *all* telecommunications carriers doing business in the City of Boston and that the requirement was *not* predicated on a carrier's use of the public rights-of-way. Although the Commonwealth of Massachusetts has *not* delegated telecommunications carrier certification authority to municipalities, the City of Boston requires, prior to doing business in the city (or as soon thereafter as practicable if the carrier is already doing business in the city), that telecommunications carriers provide information including, but not limited to: (1) the type and

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<sup>10</sup> See *Coral Springs*, 42 F.Supp.2d at 1307 ("While states may regulate universal service, protect consumers, ensure quality and protect the public safety and welfare, local governments can only manage the public rights-of-way, unless of course a state specifically delegated the state authority to its local governments."); see also *Dallas I*, 8 F.Supp.2d at 591 ("Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications."); *Prince George's County*, 49 F.Supp.2d at 815-16.

number of current customers; (2) the type of intended customers; (3) services that are offered and will be offered in the near future; (3) names of partners/affiliates/subsidiaries with specific ownership percentages; and (4) financial information such as income data and other information contained in a typical balance sheet.<sup>11</sup>

Recently, Teligent became aware of an ordinance proposed by the City of Rockville that would, similar to the Prince George's County ordinance and City of Dallas requirements, impose obligations and regulations on carriers not related to their use of the public rights-of-way. The proposed ordinance would require a telecommunications carrier to make its services available to the City at its most favorable rate for similarly situated users. Alternatively, the City may negotiate more favorable rates or may require the carrier to provide free or in-kind services to the City in lieu of the carrier's other obligations.<sup>12</sup> The City of Rockville operates under the jurisdiction of the District Court that issued the *Prince George's County* decision. Teligent has urged the City of Rockville to consider the holding of the *Prince George's County* decision when crafting and enforcing its ordinance.

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<sup>11</sup> The *Coral Springs* court found similar requirements to violate the 1996 Telecommunications Act. See Coral Springs, 42 F.Supp.2d at 1309-1311. The *Dallas I* court found that "Dallas does not have the power to require a comprehensive application and consider such factors as the company's technical and organizational qualifications to offer telecommunications services. State law and the FTA both assign that determination to the State PUC, and it may not be second-guessed by the City." *Dallas I*, 8 F.Supp.2d at 593. It also concluded that the required submission of a wide range of financial information on the company was "totally unrelated to use of the city's rights-of-way, and are thus beyond the scope of the City's authority." *Id.*

<sup>12</sup> In the *Dallas I* decision, the dedication of ducts and fiber optic strands to the City's exclusive use was found to be "totally unrelated to the use of the city's rights-of-way, and [were] thus beyond the scope of the City's authority." *Dallas I*, 8 F.Supp.2d at 593.

Teligent is not herein suggesting that the Commission take action at this time against Boston and Rockville or the multitude of other cities nationwide that are enacting or proposing to enact similar over-reaching ordinances. Teligent offers the actions of those municipalities merely as anecdotal examples of a phenomenon that is rapidly multiplying across the country as municipalities seek to extract additional revenue from the opportunities created by the local competition provisions of the 1996 Act. Teligent currently operates in 31 markets across the United States, comprising hundreds of municipalities and local governments. In Teligent's experience, most of these municipalities do not currently exceed their lawful authority over telecommunications carriers. Those that do, however, cause real harm to all carriers, particularly competitive facilities-based carriers such as Teligent and operate as barriers to entry. Moreover, if unlawful ordinances are permitted to stand because new entrants lack the resources to challenge them in costly court proceedings or cannot afford the delay in market entry that may accompany a challenge, the full benefits of local competition nationwide cannot be realized. The federal courts are recognizing the harm that such municipally-imposed entry barriers can have on telecommunications competition. As the *Austin* court explained, "[i]t goes without saying that delayed entry into the local telephone service market can have profound effects on the success of [a CLEC's] venture, particularly against a competitor as well-entrenched as [the ILEC]."<sup>13</sup>

The federal courts, fortunately, are reaching uniform conclusions concerning the lawful scope of municipal right-of-way management authority under the 1996 Telecommunications Act. The response of the federal judiciary, though, does not eliminate the Commission's role nor obviate the need for the Commission to uniformly define the scope of this authority. Otherwise,

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<sup>13</sup> *Austin*, 975 F.Supp. at 938.



carriers will face a Hobson's choice -- lengthy legal proceedings such as those cited above to protect their rights as contemplated by the Act or compliance with unlawful, burdensome municipal requirements because the time and resources to challenge are not available to them. Teligent can attest to the enormous expense that even *one* of these cases imposes on a telecommunications carrier. A city-by-city resolution of these issues would represent a needless waste of resources and would delay the full implementation of local telecommunications competition. The Commission's intervention is uniquely warranted in this circumstance. Indeed, it would not be an extraordinary leap for the Commission simply to affirm through a declaratory ruling that the holdings of the federal courts addressing this issue are, in the Commission's view, the proper interpretation of Section 253. The Commission's opinion on the proper interpretation of Section 253 has been consulted frequently by the federal courts considering such matters.<sup>14</sup> A declaratory ruling by the Commission would provide more specific and helpful guidance to local governments and courts across the nation, and thereby would likely minimize conflicts and would promote the provision of facilities-based competition and the construction of competitive networks.

Specifically, the Commission should clarify that any telecommunications carrier that does not own or maintain facilities in the public rights-of-way, does not dig up the street to construct its facilities, or otherwise does not construct its facilities in the public rights-of-way) is not subject to public rights-of-way obligations. Similarly, carriers that only lease facilities from other carriers that do own, construct, or maintain facilities using the public rights-of-way and appropriately

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<sup>14</sup> See, e.g., *Dallas I*, 8 F.Supp.2d at 591-593; *Coral Springs*, 42 F.Supp.2d at 1308; *Prince George's County*, 49 F.Supp.2d at 816.

compensate the municipality for such use should not be subject to these public right-of-way obligations. Thus, a telecommunications carrier's use of fixed wireless technology or resold services does not constitute "use" of the public rights of way as that term is employed in Section 253(c). This clarification would be fully consistent with Commission precedent.<sup>15</sup> Similarly, the Commission should conclude that local government regulation of fixed wireless carriers as users of *public* rights-of-way where such carriers locate facilities only on *private* property or lease facilities from another entity that does operate or use the public right-of-way but is already compensating the municipality for such use and entitled to recoup that compensation as a cost of providing the leased service or facility operates as an entry barrier prohibited by Section 253(a).<sup>16</sup>

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<sup>15</sup> See Definition of a Cable Television System, MM Docket No. 89-35, *Report and Order*, 5 FCC Rcd 7638 at ¶ 28 (1990) ("it is well-established that radio transmissions, including line of sight transmissions, such as the point-to-multipoint transmission . . . do not use public rights-of-way.").

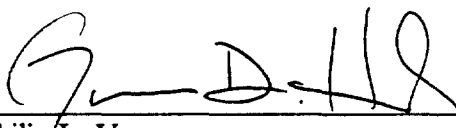
<sup>16</sup> See, e.g., *Austin*, 975 F.Supp. at 939 ("The threat of criminal sanctions and fines for the failure of an entity to obtain municipal consent can indubitably only be described as a prohibition."); see also *Prince George's County*, 49 F.Supp.2d at 814 ("The court believes that any 'process for entry' that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way 'may . . . have the effect of prohibiting' the provision of telecommunications services in violation of the FTA.").

For the foregoing reasons, Teligent urges the Commission to clarify that the operation of fixed wireless technology to provide telecommunications services cannot be deemed the "use" of the public rights-of-way where the carrier's facilities are located exclusively on private property or where the fixed wireless carrier only leases services or facilities from carriers that do construct, own, or maintain facilities in the public rights-of-way. Moreover, the Commission should confirm that local government attempts to regulate fixed wireless carriers pursuant to right-of-way management authority operates as an entry barrier violative of Section 253(a).

Respectfully submitted,

TELIGENT, INC.

By:



Philip L. Verveer  
Gunnar D. Halley

Laurence E. Harris  
David S. Turetsky  
Terri B. Natoli

TELIGENT, INC.  
Suite 400  
8065 Leesburg Pike  
Vienna, VA 22182  
(703) 762-5100

**WILLKIE FARR & GALLAGHER**  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20036  
(202) 328-8000

Attorneys for TELIGENT, INC.

Dated: October 12, 1999

ATTACHMENT TO

THE COMMENTS OF TELIGENT, INC.  
IN RESPONSE TO THE COMMISSION'S  
NOTICE OF INQUIRY

*COMPETITIVE NETWORKS RULEMAKING*

WT DOCKET No. 99-217  
CC DOCKET No. 96-98

FILED OCTOBER 12, 1999

**DESCRIPTION OF EVENTS SURROUNDING  
TELIGENT'S DALLAS FRANCHISE LITIGATION**

On or about October 1, 1997, the Texas PUC issued an order granting Teligent a Service Provider Certificate of Operating Authority ("SPCOA"). The SPCOA authorizes Teligent to operate as a provider of local exchange service, including the provision of local telephone services in the City of Dallas and in other locations in Texas. The PUC Order granting the SPCOA was the culmination of a thorough review process, in which the PUC extensively examined Teligent's financial, technical, and other qualifications as a potential local service provider. The PUC required Teligent to provide detailed financial, managerial, and technical information, information relating to the types of services to be provided, and information relating to the company's organizational structure. After reviewing the information provided by Teligent and others, the PUC found that Teligent satisfied PURA and ordered that the SPCOA be granted.

Teligent provides local telephone service in Dallas through its fixed wireless network that uses digital microwave technology to transmit signals through the air pursuant to FCC licenses. Teligent does not construct, own, or maintain any telecommunications facilities that physically occupy the public rights-of-way in Dallas. Its wireless network facilities in Dallas were installed entirely on private property.

The Dallas City Charter provides that the City "shall have the power . . . to confer upon any person, firm or corporation the franchise or right to use the public property of the city for the purpose of furnishing to the public any general public service or benefit . . . ." Chapter XIV, § 1. In reliance upon this provision, the City of Dallas required all SPCOA holders, including service providers such as Teligent that do not and will not own or maintain any facilities in the public

rights-of-way, to apply for and obtain a telecommunications franchise from the City before they could provide local telephone service in Dallas.

To obtain a telecommunications franchise from the City of Dallas, a telecommunications provider was required to submit a detailed application to the City. The franchise application required the applicant to furnish, among other things, detailed ownership and control information, detailed ownership and character qualifications, information relating to other telecommunications system holdings owned by the applicant, detailed financial information relating to the applicant's commitments to operate a telecommunications system, and detailed five-year financial projections concerning the applicant's expected quantity of customers and the applicant's anticipated revenues. The City of Dallas franchise application required a submission of a wide range of financial and other information that, in many instances, was duplicative of or even exceeded the PUC's requirements for obtaining an SPCOA.<sup>1</sup>

The City of Dallas also opted to establish and administer its own 9-1-1 emergency services network. The City prohibited its City Manager from entering into a 9-1-1 service and billing agreement with a telecommunications provider unless the provider has been certified by the PUC and franchised by the City of Dallas. Without a franchise, Teligent was unable to obtain a 9-1-1-agreement with the City. Teligent is required, under the terms of its Texas SPCOA, to provide its customers with access to the vital 9-1-1 emergency services network. Moreover, the terms of

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<sup>1</sup> In June 1999, the State of Texas enacted a new law prohibiting cities from imposing franchise requirements on carriers that do not place facilities in the public rights-of-way and expressly notes that the use of airwaves cannot be deemed use of the public rights-of-way.

Southwestern Bell's interconnection agreement with Teligent requires that Teligent comply with all 9-1-1 certification requirements prior to interconnection. Even absent such requirements, however, Teligent would not be able to compete against the incumbent LECs within the limits of the City without a 9-1-1 agreement. It simply could not put the health and safety of its customers at risk by offering telephone service without 9-1-1 emergency access.

On October 6, 1997, in anticipation of its pending entry into the Dallas local service market, while reserving its rights to challenge the City's franchise requirement, Teligent submitted to the City of Dallas its application for a telecommunications services franchise. Prior to and at the time Teligent submitted its franchise application, Teligent conveyed to the City its position that the franchise requirement and the related 9-1-1 Resolution, as applied to Teligent, were in contravention of state and federal law, and requested that the City reconsider its position. Teligent also advised the City that a federal court in Austin, Texas had recently issued a preliminary injunction order enjoining the City from imposing a similar franchise requirement on telecommunications service providers that do not construct, own or maintain facilities in the public rights-of-way. The City refused to reconsider its position. Since the franchise approval process could take from six weeks to several months and because Teligent had to have a 9-1-1 agreement to compete in the Dallas market, Teligent opted to preserve its ability to enter the Dallas market without further undue delay or uncertainty and therefore submitted its franchise application for processing as it completed preparations to enter the Dallas market.

On November 12, 1997, the Dallas City Council approved Teligent's franchise application. According to the terms of the Franchise Ordinance, Teligent had 30 days to accept the franchise. Until and unless Teligent accepted the Franchise Ordinance, it was precluded from obtaining a

9-1-1 agreement from the City and was thus precluded from entering the Dallas market.

Therefore, on December 12, 1997, Teligent accepted the Dallas Franchise Ordinance under protest and for the sole purpose of obtaining a 9-1-1 agreement so that it would be able to enter the Dallas local telephone service market. As explained in more detail below, Teligent filed suit against the City of Dallas the same day.

The Franchise Ordinance, had it been enforced, would have imposed obligations far beyond the limited authority granted to Dallas, under either state or federal law, to manage its public rights-of-way or to require fair and reasonable compensation, on a competitively neutral and nondiscriminatory basis, for the use of its public rights-of-way. Under the Franchise Ordinance, Teligent would have had to pay to the City a monthly compensation fee equal to four percent of Teligent's gross receipts arising out of its local, intrastate, and interstate telecommunications operations in Dallas -- an inherently non-neutral and discriminatory fee since Teligent did not and does not own or maintain any facilities in the public rights-of-way. Further, despite the fact that municipalities have no authority to require franchise agreements or the payment of fees from interexchange carriers, the Franchise Ordinance defined "gross revenues" as including revenues derived from long distance service.

The Franchise Ordinance, had it been enforced, would have imposed numerous other continuing requirements on Teligent, including the obligation to: (1) provide ubiquitous services throughout the entire City as a public service provider; (2) provide copies of all work plans and drawings to the City prior to commencement of any construction and, after completion of construction, provide copies of "as built" drawings; (3) permit the City to use, without charge, one duct or subduct in each conduit for the City's use (an impossibility with a fixed wireless



carrier which the City nevertheless insisted on including in the Franchise Ordinance); (4) secure and maintain a corporate surety bond in an amount of \$100,000 to secure Teligent's performance under the franchise; (5) maintain workers' compensation, commercial general liability, and automobile liability insurance in defined minimum amounts; (6) provide to the City for its use a single dark fiber pair used for transmission purposes (again, an impossibility for a fixed wireless carrier unless it leased this facility from another entity in order to provide it to the City); (7) maintain books and records of Teligent's business in such a way that breakdowns of revenue would be available by type of service within the City; (8) submit to the City audited financial statements; (9) submit to the City audits of Teligent's business and financial records and reimburse the City for all reasonable travel expenses if books and records were not maintained within the City; (10) notify the City of all petitions, applications, communications, and reports submitted by Teligent to the FCC, SEC, and Texas PUC relating to matters affecting the use of the public rights-of-way and/or the telecommunications operations authorized by the Franchise Ordinance; (11) provide prior notification to the City of all services offered within the City; and, (12) indemnify and hold the City harmless for injuries or damages arising out of Teligent's conduct under the franchise.

The Franchise Ordinance thus imposed a detailed regulatory scheme on Teligent that encompassed nearly every aspect of Teligent's operations notwithstanding the fact that Teligent did not own or maintain facilities in the public rights-of-way. Moreover, Teligent believed that the City's refusal to grant a 9-1-1 agreement to Teligent unless it obtained a franchise was an egregious abuse of the City's management of its 9-1-1 emergency network. Consequently, on December 12, 1997, Teligent filed with the United States District Court for the Northern District

of Texas, Dallas Division a Complaint for Declaratory Judgment against the City seeking a judicial declaration that the franchise requirement imposed on Teligent by the City of Dallas violated the laws and the Constitution of the United States and of the State of Texas. Thereafter, Teligent filed with the same court an Application for Preliminary Injunction against the City seeking to enjoin the City from enforcing its franchise agreement against Teligent and requiring that Teligent be franchised before obtaining a 9-1-1 emergency services agreement.

The court agreed with Teligent and issued a preliminary injunction enjoining the City of Dallas from requiring Teligent to apply for and obtain a franchise before it could offer telecommunications in Dallas, from requiring Teligent to obtain a franchise before it could enter into a 9-1-1 agreement from Dallas, and from enforcing its City Ordinance by which Dallas granted Teligent a franchise to provide services in Dallas.<sup>2</sup> The court noted that Federal and Texas law "limit the scope of Dallas's authority to two narrow functions: requiring a franchise for or otherwise regulating use of the city's rights-of-way, and charging compensation for that use."<sup>3</sup> The court went on to explain that "[a]ll of the legislative history surrounding the adoption of § 253(c), and the cases that have since been decided on the issue, have interpreted the provision to apply to physical occupation of a city's rights-of-way."<sup>4</sup> It stated that it was "unpersuaded that

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<sup>2</sup> AT&T Communications of the Southwest, Inc. v. City of Dallas, Texas, 52 F.Supp.2d 756, 763 (N.D. Tex. 1998).

<sup>3</sup> Id. at 760-61. The court also explained that "[i]f Congress had intended the broad interpretation of § 253(c) that the City proposes it would have defined a municipality's authority as management of all providers of local telephone service, and the imposition of fees for the right to provide it. Through the [Federal Telecommunications Act] Congress expressly removed such broad regulatory power from local governments." Id. at 762.

<sup>4</sup> Id. at 761.

transmitting microwaves through the air, or leasing the facilities of other providers constitutes 'use' of Dallas's rights-of-way."<sup>5</sup> The court concluded that "[b]y imposing franchise requirements on a telecommunications provider that will not use any of the City's rights-of-way, Dallas has overstepped the limits of its regulatory authority under the [Federal Telecommunications Act] and the Texas [Public Utility Regulatory Act]."<sup>6</sup>

After receiving the preliminary injunction, Teligent and attorneys for the City of Dallas entered into settlement negotiations. The attorneys reached an agreement that was subject to Dallas City Council approval. The City Council did not give its approval, so the litigation continued. The court subsequently granted Teligent a summary judgment on its Section 253(a) preemption claim and permanently enjoined Dallas from enforcing its franchise agreement against Teligent and from requiring such an agreement prior to entering into a 9-1-1 emergency service agreement.<sup>7</sup> Albeit successful, the entire process for this one city took nearly two years and involved enormous legal costs -- a process that facilities-based new entrants cannot afford to undertake too often if they are to survive as efficient competitors.

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<sup>5</sup> Id. at 761-62.

<sup>6</sup> Id. at 763. The court also concluded that "imposing franchise obligations on Teligent would amount to discriminating against the Company. Teligent would be forced to pay franchise fees twice: once to the City directly and once to the other service provider from which it leases facilities." Id. at 762, n.22.

<sup>7</sup> See AT&T Communications of the Southwest, Inc. v. City of Dallas, No. CIV.A.3:98-CV-0003-R, *Memorandum Opinion and Order*, 1999 WL 324668 (N.D. Tex. May 17, 1999).

## **CERTIFICATE OF SERVICE**

I, Rosalyn Bethke, do hereby certify that on this 12th day of October 1999, copies of the foregoing Comments of Teligent, Inc. In Response to the Commission's Notice of Inquiry filed today with the FCC in WT Docket No. 99-217/CC Dkt No. 96-98 were served by hand delivery on the following parties:

Chairman William E. Kennard  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Suite 8-B201  
Washington, DC 20554

Commissioner Michael Powell  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Suite 8A204A  
Washington, DC 20554

Commissioner Harold Furchtgott-  
Roth  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Suite 8A302  
Washington, DC 20554

Commissioner Gloria Tristani  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Suite 8C302  
Washington, DC 20554

Commissioner Susan Ness  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Suite 8B115  
Washington, DC 20554

Thomas Sugrue  
Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W., Room  
3C207  
Washington, DC 20554

Melvin C. Del Rosario  
Wireless Telecommunications Bureau  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W., Room  
4C264  
Washington, D.C. 20554

James D. Schlichting  
Wireless Telecommunications Bureau  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W., Room  
3C207  
Washington, D.C. 20554

Joel D. Taubenblatt  
Wireless Telecommunications Bureau  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W., Room  
4A260  
Washington, D.C. 20554

Kathleen O'Brien Ham  
Wireless Telecommunications Bureau  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W., Room  
3C207  
Washington, D.C. 20554

Jeffrey Steinberg  
Wireless Telecommunications Bureau  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W.  
4th Floor, Suite 4C236  
Washington, DC 20554

Steve Weingarten  
Wireless Telecommunications Bureau  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W., Room  
3C207  
Washington, D.C. 20554

Elizabeth Lyle  
Wireless Telecommunications  
Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Room 3C227  
Washington, DC 20554

David Furth  
Wireless Telecommunications  
Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Room 3C217  
Washington, DC 20554

International Transcription Services,  
Inc.  
1231 20th Street, N.W.  
Washington, DC 20037



Rosalyn Bethke